163 U.S. 132

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

NO. ~~487~~ 199

THE UNITED STATES, PLAINTIFF,

vs.

FRANK M. RIDER, JOHN F. BURGESS, AND SAMUEL N. RUTLEDGE, COMMISSIONERS OF MUSKINGUM COUNTY, OHIO.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

**FILED DECEMBER 1, 1892.**

**(15222.)**



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INDEX.


| | Original. | Print. |
|---|---|---|
| Caption | 1 | 1 |
| Order to file information | 1 | 1 |
| Information | 2 | 1 |
| Trial | 4 | 2 |
| Motion for new trial | 5 | 3 |
| Certificate of division in opinion | 6 | 3 |
| Clerk's certificate | 9 | 4 |

1 THE UNITED STATES OF AMERICA,
*Eastern Division of the Southern District of Ohio, ss:*

At a stated term of the circuit court of the eastern division of the southern district of Ohio, in the sixth judicial circuit of the United States of America, begun and held in the court rooms, at the city of Columbus, O., in said district, on the first Tuesday of June, being the 7th day of that month, in the year of our Lord one thousand eight hundred and ninety-two, and of the Independence of the United States of America the one hundred and sixteenth.

Present: The Hon. Wm. F. Taft, circuit judge, and the honorable Geo. R. Sage, district judge.

Among the proceedings had were the following, to wit:

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| THE UNITED STATES OF AMERICA, COMPLAINANTS, *vs.* FRANK M. RIDER, JOHN F. BURGESS, & SAMUEL N. RUTLEDGE, commissioners of Muskingum County, defendants. | # 211. | In chancery. |

Be it remembered, that heretofore, to wit, on the 23rd day of November, A. D. 1891, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 213.

On motion of the district attorney, leave is given him to file a criminal information herein forthwith, and the same is accordingly done.

2 And afterwards, to wit, on the 23rd day of November, A. D. 1891, the following criminal information was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

*Criminal information.*

United States circuit court, southern district of Ohio, eastern division.

At the December term of the circuit court of the United States for the southern district of Ohio, eastern division, in the year of our Lord one thousand eight hundred and ninety-one, leave being first had and obtained, comes John W. Herron, attorney for the United States in said district, and informs the court that, as appears from a complaint on oath and a transcript of proceedings held before one Norman Chandler, a commissioner of this court, at Zanesville, and now placed on file herewith:

Upon the fifteenth day of October, A. D. 1891, the defendants, Frank M. Rider, John F. Burgess, and Samuel M. Rutledge were then and there the county commissioners in Muskingum County, in the State of Ohio, and then and there the persons empowered by the law of Ohio to construct, alter, and keep in repair all necessary bridges over streams and public canals, on all State and county roads, and then and there the persons as such county commissioners controlling the bridge across the Muskingum River between Taylorsville and Duncan's Falls, Muskingum County, Ohio;

and the Secretary of War of the United States, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum River, one of the navigable
3 streams over which the United States has jurisdiction, on the 19th day of December, 1890, gave notice in writing to the said defendants, commissioners as aforesaid, setting forth in substance that the said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate the Muskingum River by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complainant, Tuesday, the 6th of January, 1891, was set and named as the day when such evidence should be heard before Lieut. Col. Wm. E. Merrill, Corps of Engineers, at the U. S. Engineer's office in Zanesville, Ohio, and which said day of hearing, at the request of defendants, was extended to the third day of February, 1891, and afterwards, to-wit, on the 25th day of February, 1891, and after said day of hearing, the Secretary of War gave notice in writing to said defendants, controlling said bridge as aforesaid, that the said bridge was and is an unreasonable obstruction to the free navigation of the said river, one of the navigable waters of the United States, on account of not being provided with a draw-span below the new U. S. lock No. 9, in said river, and requiring the following change to be made, viz, the construction of a draw span in said bridge below the said lock, in accordance with the plan shown in a map attached to said notice, and served upon said defendants, and prescribing that said alteration shall be made and completed within a reasonable
4 time, to wit, on or before the 30th day of September, 1891, and that the service of said notice as aforesaid was made on the 3rd day of March, 1891, by delivering, personally, a copy thereof to said commissioners, at their office in Zanesville, Ohio.

And the said Frank M. Rider, John F. Burgess, and Samuel M. Rutledge, county commissioners of Miskingum County, Ohio, as aforesaid, did unlawfully, on, to wit, the fifteenth day of October, 1891, at the place aforesaid, and after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully failed and refused to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice, contrary to the form of sections 4 and 5 of an act of Congress approved September 18th, 1890, in such case made and provided, and against the peace and dignity of the United States of America.

JOHN W. HERRON,
*U. S. Attorney, S. D. O.*

And afterwards to wit, on the 11th day of December, 1891, an entry was made upon the journal of said court, clothed in the words and figures following, to wit:

Journal B, p. 329.

This day comes the parties by their attorneys, and said defendants being present in court, thereupon a jury being called came, to wit, Lee Atherton, John C. Butler, Franklin Burlingame, J. D. Coles, George Johnson,

William H. McBride, E. A. Peters, Adam Quick, John Rogers, George Seall, Albert Wright, and Joseph H. Geiger, who were duly empaneled and sworn, well and truly to try the issues joined, and having heard the testimony and the charge of the court, upon their oaths do find said defendants guilty in manner and form as charged in said information, whereupon counsel for defendants gave notice of motion for new trial.

And afterwards, to wit, on the 22nd day of December, A. D. 1891, the following motion was filed in the clerk's office of said court, clothed in the words and figures following, to wit:

United States district and circuit court, southern district.

UNITED STATES, PLAINTIFF,
*vs.*
FRANK M. RIDER, JOHN F. BURGESS, & Samuel N. Rutledge, commissioners of Muskingum County, defendants.

*Motion for new trial.*

Now comes the defendants and moves the court for a new trial in this cause for the following reasons, to wit:

2nd. Because the verdict is contrary to law;
1st. Because the verdict is against the evidence and the law;
3rd. Because the verdict is not supported by the law;
4th. The court erred in charging the jury; and
5th. For other errors apparent upon the record.

F. H. SOUTHARD,
S. M. WINN,
*Attys. for Defendants.*

And afterwards, to wit, on the 10th day of November, A. D. 1892, an entry was made upon the journal of said court clothed in the words and figures following, to wit:

Journal B, p. 423.

Upon the trial of this cause before the honorable George R. Sage, district judge, sitting in the circuit court, the following questions were reserved for hearing and decision upon a motion made for a new trial, to be heard before the circuit judge and the district judge as to the constitutionality of the section of the law upon which the commissioners were tried, and upon which the criminal information was founded, viz: Section 4 of the river and harbor act approved September 19th, 1890, provides: "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed, or which may hereafter be constructed over any of the navigable waterways of the United States, is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by raft, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the

parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling said bridge, so as to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has
7 not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

Section 5. That if the persons, corporations, or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect, as hereinbefore required, from the Secretary of War, and within the time prescribed by him, wilfully fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporations, or associations shall be deemed guilty of misdemeanor, and on conviction thereof shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporations, or associations shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporations, or associations so offending to the penalties above prescribed.

And this cause coming on to be heard before the honorable George R. Sage and the honorable William H. Taft, judges of said court sitting therein, upon the motion of defendants for a new trial in the above-entitled cause, certain questions reserved upon the trial came on to be heard and decided by the court, to wit:

1st. Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said section' 4 and 5 of the act of September 19th, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river.

2nd. Whether the failure to comply by persons owning and con-
8 trolling the said bridge with the order of the Secretary of War can lawfully subject them to a prosecution for a misdemeanor.

Upon which said questions the judges aforesaid were divided in opinion.

It is thereupon ordered that the said pointes of disagreement, stated as above, under the direction of said judges, be at once certified under the seal of this court to the Supreme Court of the United States.

WM. H. TAFT,
*U. S. Circuit Judge.*
GEORGE R. SAGE,
*U. S. District Judge, S. D. O.*

9 THE UNITED STATES OF AMERICA,
*Eastern Division of the Southern District of Ohio, ss:*

I, B. R. Cowen, clerk of the circuit court of the United States within and for the divisions and district aforesaid, do hereby certify that the foregoing is a true and complete transcript of the proceedings by and before said court in the above-entitled cause, as the same appears of record and on file in the clerk's office of the said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at the city of Columbus, this 15th day of November, A. D. 1892.

[SEAL.]

B. R. COWEN, *Clerk*,
By JANIE W. F. COWEN,
*Deputy Clerk.*

(Indorsement on cover:) Case No. 15222. Term No. 487. The United States, plaintiff, vs. Frank M. Rider, John F. Burgess, & Samuel N. Rutledge, commissioners of Muskingum County, Ohio. S. Ohio. C. C. U. S. Filed December 1, 1892. Supreme Court U. S. Clerk's office. Received Dec. 1, 1892.

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JAMES H. McKENNEY,
CLERK.

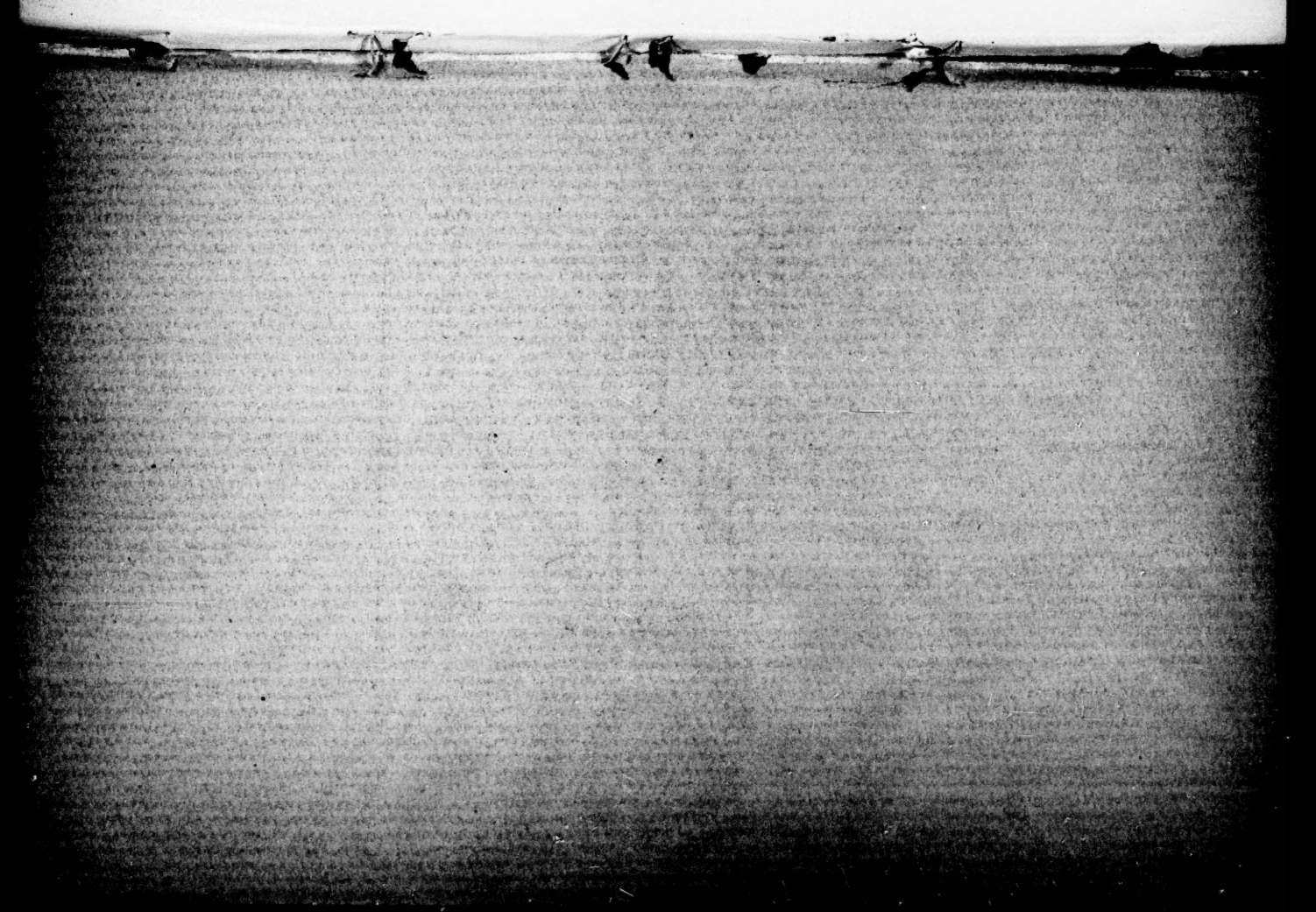
# In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF,
*v.*
FRANK M. RIDER, JOHN F. BURGESS, AND Samuel N. Rutledge, Commissioners of Muskingum County, Ohio. } No. 197.

**ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.**

## BRIEF FOR THE UNITED STATES.



# In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF,
*v.*
FRANK M. RIDER, JOHN F. BURGESS, AND Samuel N. Rutledge, Commissioners of Muskingum County, Ohio. } No. 197.

**ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.**

## BRIEF FOR THE UNITED STATES.

### STATEMENT.

This case comes upon a certificate from the circuit court of the United States for the southern district of Ohio.

On the 23d day of November, 1891, the United States district attorney filed a criminal information against Frank M. Rider, John F. Burgess, and Samuel M. Rut-

ledge, charging that said defendants, as the commissioners of Muskingum County, Ohio, controlled the bridge across the Muskingum River, between Taylorsville and Duncan Falls, Muskingum County, Ohio; that the Secretary of War of the United States, having good reason to believe that said bridge was an unreasonable obstruction to the navigation of said river, it being a navigable stream, on the 19th day of December, 1890, gave notice in writing to said defendants that said bridge was considered an obstruction to navigation, by reason of the fact that it had no draw for the passage of boats desiring to navigate said river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio; that in order to afford said commissioners a reasonable opportunity to be heard and give evidence in regard to said complaint, the 6th day of January, 1891, was set and named as the day when such evidence should be heard before Lieut. Col. William E. Merrill, Corps of Engineers, at the the United States engineer's office in Zanesville, Ohio, which said day of hearing, at the request of defendants, was extended to the 3d day of February, 1891, and afterwards, on February 25, 1891, and after said day of hearing, the Secretary of War gave notice, in writing, to said defendants that the said bridge was and is an unreasonable obstruction to the free navigation of said river on account of not being provided with a draw below the new United States lock No. 9, in said river, and requiring the following change to be made, viz: The construction of a draw span in said bridge below the said lock, in accordance with the plan shown

in a map attached to said notice, and prescribing that such alteration shall be made and completed within a reasonable time, to wit, on or before the 30th day of September, 1891; that said notice was served on March 3, 1891; and that said commissioners, on the 15th day of October, 1891, after receiving said notice from the Secretary of War, and within the time prescribed by him, willfully failed and refused to comply with the said order of the Secretary of War, and to make the alterations set forth in said notice. (Rec., pp. 1, 2.)

This information was filed under sections 4 and 5 of the act of September 19, 1890. (26 Stat., 453.)

Defendants were tried December 11, 1891, and the jury found them guilty as charged in said information. (Rec., pp. 2, 3.)

On the 22d day of December, 1891, defendants moved for a new trial. (Rec., p. 3.)

Upon the trial before the district judge the question of the constitutionality of the sections of the law upon which the commissioners were tried was reserved for hearing and decision upon a motion for a new trial before the circuit and district judges, who, upon the hearing of said motion, were divided in opinion, and have, under section 697, Revised Statutes, certified the points of disagreement to this court. (Rec., pp. 3, 4.)

## QUESTIONS CERTIFIED.

*The first question certified is as follows:*

> Whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said sections 4 and 5 of the act of

September 19, 1890, to determine when a bridge is an unreasonable obstruction to the free navigation of a river. (Rec., p. 4.)

Section 4 of the *Act of September 19, 1890* (26 Stat., 453), is as follows:

> That section nine of the river and harbor act of August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:
>
> "That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of the navigable waterways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening or the draw span of such bridge by rafts, steamboats, or other water craft, it shall be the duty of the said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy, and unobstructed; and in giving such notice he shall specify the changes required to be made, and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States district attorney for the district in which such bridge is situated, to the end that the criminal proceedings mentioned in the succeeding section may be taken."

Section 5 is as follows:

> That section ten of the river and harbor act of

August eleventh, eighteen hundred and eighty-eight, be amended and reenacted so as to read as follows:

"That if the persons, corporation, or association owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required from the Secretary of War, and within the time prescribed by him, willfully fail or refuse to remove the same, or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation, or association shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished by a fine not exceeding five thousand dollars; and every month such persons, corporation, or association shall remain in default in respect to the removal or alteration of such bridge shall be deemed a new offense, and subject the persons, corporation, or association so offending to the penalties above prescribed."

*The second question certified is as follows:*

Whether the failure to comply by persons owning and controlling the said bridge with the order of the Secretary of War can lawfully subject them to a prosecution for a misdemeanor. (Rec., p. 4.)

POINTS AND ARGUMENT.

I.

*The United States, before the case in question arose, had assumed jurisdiction over the Muskingum River.*

The *River and Harbor Act of August 5, 1886* (24 Stat., 324), provided as follows:

Improvement of the Muskingum River, Ohio, between Zanesville and the mouth of the river, and for operating the same, twenty thousand dollars. And the United States hereby accepts from the

State of Ohio the said Muskingum River improvement, and all the locks, dams, and their appurtenances, and the canals belonging to said improvement, and all the franchises and property of every kind, and rights in said river, and its improvements now owned, held, and enjoyed by the State of Ohio, including all water leases and rights to use water under and by virtue of any lease of water now running and in force between the State of Ohio and all persons using said water, hereby intending to transfer to the United States such rights in said leases and contracts as are now owned, held, or reserved by the State of Ohio; but not to affect any right to the use of the water of said river now owned and held by the lessees of any water right under any lease or contract with the State of Ohio. And the United States hereby assumes control of said river subject to the paramount interest of navigation. The provisions of this act, so far as they relate to the Muskingum River, shall not take effect, nor shall the money hereby appropriated be available until the State of Ohio, acting by its duly authorized agent, turns over to the United States all property ceded by the act of the general assembly aforesaid, and all personal property belonging to the improvement aforesaid, and used in its care and improvement, and any balance of money appropriated by said State for the improvement of said river, and which is not expended on the fifteenth day of July, eighteen hundred and eighty-six.

On April 7, 1887, the United States accepted the Muskingum River improvements in Ohio under the river and harbor act of August 5, 1886.

The river and harbor act of August 11, 1888 (25 Stat., 405), appropriated $60,000 for ice harbor at the mouth of Muskingum River, Ohio.

II.

*The power of Congress over navigable streams is supreme, and grows out of the power to regulate commerce.* (*Monongahela Navigation Co.* v. *United States*, 148 U. S., 335; *Bridge Co.* v. *United States*, 105 U. S., 475.)

III.

*When Congress chooses to act, it is not concluded, by anything that the States or that individuals by its authority have done, from assuming entire control of the matter, and abating any erections that may have been made, and preventing any others from being made, except in conformity with such regulations as it may impose.* (*State of Pennsylvania* v. *The Wheeling, etc., Bridge Co.*, 13 Howard, 518; *Gilman* v. *Philadelphia*, 3 Wall., 713; *Willamette Iron Bridge Co.* v. *Hatch*, 125 U. S., 1, 12; *Monongahela Navigation Co.* v. *United States*, 148 U. S., 336.)

IV.

*The power of Congress to declare what is an obstruction and to remove it from a navigable stream is well settled.* (*Gilman* v. *Philadelphia*, 3 Wall., 713; *The Daniel Ball*, 10 Wall., 557; *The Montello*, 20 Wall., 431; *Bridge Co.* v. *United States*, 105 U. S., 470; *Escanaba Co.* v. *Chicago*, 107 U. S., 678; *Miller* v. *Mayor of New York*, 109 U. S., 385; *Monongahela Navigation Co.* v. *United States*, 148 U. S., 335.)

V.

*The power intrusted to the Secretary of War by sections 4 and 5 of the river and harbor act of September 19, 1890, is not a delegation of the legislative function.*

In *United States* v. *Keokuk and H. Bridge Co.* (45 Fed. Rep., 178) Judge Shiras held that:

> A bridge having been built and maintained in accordance with the requirements of an act of Congress, the Secretary of War can not declare it an obstruction to navigation and require it to be changed, remodeled, or rebuilt under the *Act of Congress of August 11, 1888* (25 U. S. Stat. L., p. 424, secs. 9, 10), providing that when he shall have reason to believe that any bridge is an obstruction to free navigation, or where there is difficulty in passing the draw opening or raft span, the Secretary of War shall give notice requiring the bridge to be altered so as to render navigation through or under it free, easy, and unobstructed, and that the owner of any such bridge shall be liable to a penalty for willfully failing to remove the bridge or to cause the necessary alterations to be made.

The ground proceeded upon was that—

> The section in question confers upon the Secretary the duty of determining whether a given bridge is an unreasonable obstruction, which in turn involves the duty of determining how much of an obstruction the public interests require should be placed in the way of the free navigation of the river, which is a question which belongs to Congress to determine, and which can not be rightfully delegated to any subordinate authority or person (p. 183).

Sections 9 and 10 of the act of 1888 were amended by sections 4 and 5 of the act of 1890.

Among other material changes made by the amendments, it is provided that the obstruction must be "*unreasonable*," and that the parties shall have a "*reasonable*

*opportunity to be heard*," and that the Secretary of War shall "*specify the change required to be made.*"

Section 5 expressly makes a failure to comply with the requirements of section 4 a misdemeanor.

In this case, United States District Judge Sage followed Judge Shiras, extending the doctrine as laid down by him to the sections as amended, saying "the question to be here decided is whether Congress could delegate, as it has undertaken to do, its authority in the premises to the Secretary of War. My conclusion is that it could not." (*United States* v. *Rider*, 50 F. R., 410.)

The question for consideration seems to be as follows:

Congress has passed a complete act providing that it shall be a misdemeanor to maintain an unreasonable obstruction to navigation after a notice and hearing and after the special tribunal charged with the investigation of and finding of the fact has determined that there is an unreasonable obstruction and a reasonable time for removing the obstruction has expired.

The party concerned has a hearing, and the offense is not complete until after the hearing and a determination against him and an opportunity to abate the nuisance has been given.

The whole inquiry seems to resolve itself into whether or not Congress must itself consider each case of alleged obstruction to navigation and determine the facts, and declare that an obstruction exists, or whether it can generally define the offense and leave the facts to be determined by a court or special tribunal.

Because Congress is vested with the power, as incidental to the commerce clause, to protect navigation, and,

therefore, can declare and remove an obstruction, it does not follow that it must itself examine into the details and facts of each case. This would be impracticable and would almost nullify the use of the power.

Between sessions, obstructions to navigation, no matter how outrageous, could not be dealt with. If Congress should undertake, during the sessions, to investigate specific cases, it is manifest that it would simply amount to a practical abdication of the power; for in the nature of things it would be impossible, within any reasonable time, to determine such questions.

It would be equally out of the question for Congrsss to attempt to define "unreasonable obstruction to navigation," so as to make the definition practically safe and useful. It might as well be attempted to define "fraud" by a statute and fix its limitations and characteristics.

If the power is to be exercised at all, it must be under a general law declaring, as the law in question does, that the maintenance of an unreasonable obstruction shall be a misdemeanor, and the determination of the facts must be left to some tribunal, either a regular court, or a commission, or an executive officer. The determination of such a question in the regular course of judicial proceedings would be tedious, expensive, and the results would be variable, inasmuch as separate juries could come to different conclusions upon practically the same state of facts. In the interest of economy, promptness, and uniformity of decisions, it is manifest that the best course to be adopted is the one that has been pursued.

If the act, in general terms, made the maintenance of an obstruction a misdemeanor, and if there could then be

a conviction upon the determination of the Secretary of War, or any other tribunal, of the question as to whether or not there had been an unreaasonable obstruction, it could be objected that persons would be committing a misdemeanor without knowing at the time that there was a violation of the law.

The act in question, however, is not open to this criticism. There is first a hearing and a determination of the facts, and then there is an opportunity to avoid committing the offense, and the offense is only complete after the party is fully apprised of all the conditions.

In this case the Secretary of War is made a special tribunal to adjudicate facts.

It is competent for the legislature to establish, independent of the courts, special tribunals whose judgment shall be final.

The taxing interests of this country involve by far the largest question so far as value is concerned. The assessment of property is necessarily intrusted to special tribunals, which operate constantly and upon a vast scale. They are composed of nonjudicial officers, and if they pursue the law their conclusions are final.

In *Nishimura Ekiu* v. *United States* (142 U. S., 651) and *Fong Yue Ting* v. *United States* (149 U. S., 698) and *Lem Moon Sing* v. *United States* (158 U. S., 538) it was held that Congress might intrust to executive officers the final determination of facts upon which foreigners might be sent out of or excluded from this country, and that their conclusions could not be reexamined by any court.

Congress has repeatedly passed laws committing the execution of acts in regard to the admission of aliens into the United States to the Secretary of the Treasury, collectors of customs, and to inspectors acting under their authority. (See acts of Mar. 3, 1875, c. 141, 18 Stat., 477; Aug. 3, 1882, c. 376, 22 Stat., 214; Feb. 23, 1887, c. 220, 24 Stat., 414; Oct. 19, 1888, c. 1210, 25 Stat., 566.)

By section 3 (22 Stat., 214), and in similar laws, the Secretary of the Treasury was authorized to establish rules and regulations and to issue instructions to carry out these and other immigration laws of the United States.

In *Enterprise Saving Association* v. *Zumstein* (67 F. R., 1000) it was held by the circuit court of appeals of the sixth circuit, in an opinion delivered by Judge Lurton, and concurred in by Judges Taft and Severens, that in enforcing the postal laws against lotteries it was competent for Congress to intrust to the head of the Post-Office Department the determination of the question as to what was a lottery.

Congress can only legislate in a general way, and large powers are necessarily intrusted to the different departments—such, for instance, as the supervising power given to the Secretary of the Interior over questions of patents and relations to Indians and the public lands. It has been held that he can set aside a survey and order another survey and issue a patent thereon, which is the exercise of judicial power. This right arises from the supervising power given him under the statute, and the courts

have invariably sustained it, and in speaking of this class of powers has said:

> It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are, therefore, not provided for by express statute, may sometimes arise and therefore that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice. (*Williams* v. *United States*, 138 U. S., 524; *Snyder* v. *Sickles*, 98 U. S., 203; *Knight* v. *United States Land Assn.*, 142 U. S., 161, 180, 181.)

Congress may directly *or through corporations* created for that object construct bridges or railroads for the accommodation of interstate commerce. (*California* v. *Central Pacific Rwy. Co.*, 127 U. S., 1; *Luxton* v. *North River Bridge Co.*, 153 U. S., 525.)

In *McCulloch* v. *Maryland* (4 Wheat., 316, 421) Chief Justice Marshall said:

> The sound construction of the Constitution must allow to the National Legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional.

It has now been established beyond controversy that Congress has the power to incorporate national banks and

clothe them with large discretionary powers and for the purpose of accomplishing what Congress itself might directly do.

This power was maintained in *McCulloch* v. *Maryland* (4 Wheat., 316) and in *Osborn* v. *United States Bank* (9 Wheat., 738) mainly upon the ground that it was an appropriate means for carrying on the money transactions of the Government. (*Legal Tender Case*, 110 U. S., 445.)

*In re* The Laura (114 U. S., 411), although the pardoning power is, by the Constitution, vested in the President, the court held that an act authorizing the Secretary of the Treasury to remit fines and penalties incurred by a steam vessel valid, and they held that to determine otherwise would be to overthrow the practice which had been observed and acquiesced in for nearly a century. And in *Dorsheimer* v. *United States* (7 Wall., 166) it was held that such power intrusted to the Secretary of the Treasury is one for the exercise of his discretion in a matter intrusted to him alone, and that it admits of no appeal to any court.

In all those cases in which it is held that executive officers of the Government will not be controlled by the courts in matters in which they have to exercise judgment or discretion, it is apparent that large powers are intrusted by Congress under the acts investing them with authority, and that they really exercise in this way, by delegation, and necessarily so, for the purpose of carrying on the vast affairs of the Government and its details, authority which in a strict sense pertains to Congress. (See *Decatur* v. *Paulding*, 14 Pet., 497–514; *United*

*States* v. *Guthrie*, 17 How., 284; *United States* v. *The Commissioners*, 5 Wall., 563; *Litchfield* v. *Register and Receiver*, 9 Wall., 575–577; *Carrick* v. *Lamar*, 116 U. S., 426.)

In *United States* v. *Breen* (40 F. R., 402), it was held that Congress can authorize the Secretary of War to make rules and regulations, and can make it a misdemeanor to violate these rules when so made.

In *United States* v. *Bailey* (9 Pet., 238) it was held that the crime of perjury, which was defined by statute, could be committed by taking an oath in conformity with a mere regulation of the Treasury Department.

In *Caha* v. *United States* (152 U. S., 219), in commenting upon this decision, the court said:

> It was held that the Secretary had power to establish the regulation, and that the effect of it was to make the false affidavit before the justice of the peace perjury within the scope of the statute, and this notwithstanding the fact that such justice of the peace was not an officer of the United States.

In the Caha Case, the court upheld an indictment for perjury, which grew out of proceedings instituted in accordance with regulations of the Interior Department.

These cases and the case under consideration differ from that of *United States* v. *Eaton* (144 U. S., 677), in which the court held that a failure to comply with regulations made by the Commissioner of Internal Revenue could not be punished.

The reason was that the statute had not made such refusal an offense.

The court said:

> It is necessary that a sufficient statutory authority should exist for declaring any act or omission a criminal offense; and we do not think that the statutory authority in the present case is sufficient. If Congress intended to make it an offense for wholesale dealers in oleomargarine to omit to keep books and render returns, as required by regulations to be made by the Commissioner of Internal Revenue, it would have done so distinctly, in connection with an enactment such as that above recited, made in section 41 of the act of October 1, 1890.
>
> Regulations prescribed by the President and by the heads of Departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to support acts done under them and in accordance with them, and may thus have, in a a proper sense, the force of law; but it does not follow that a thing required by them is a thing so required by law as to make the neglect to do the thing a criminal offense in a citizen where a statute does not distinctly make the neglect in question a criminal offense (p. 688).

The case under discussion has the element which was lacking in the Eaton Case, for a statute has distinctly made the neglect in question a misdemeanor.

The act of July 5, 1884, section 3, makes the Commissioner of Navigation's finding conclusive on all questions of interpretation growing out of the execution of the laws relating to the collection of tonnage tax. (*N. G. L. S. S. Co.* v. *Hedden*, 43 F. R., 17–25.)

The authority of Congress to authorize corporations to build railroads and construct bridges over navigable

streams is settled. (*Stockton* v. *Baltimore and N. Y. R. Co. et al.*, 32 F. R., 9.)

It rests on the commerce clause.

In doing this Congress in a certain sense delegates its power, to wit, it empowers the corporation to build bridges appropriate to the purpose. In the case at bar we have the converse. It empowers the Secretary of War to protect navigation from obstructions, and this necessarily involves the determination of what does obstruct.

Among the powers conferred upon Congress by the eighth section of the first article of the Constitution are the following:

> To provide and maintain a navy.
>
> To make rules for the government and regulation of the land and naval forces.

It was held in *Dynes* v. *Hoover* (18 How., 20), and the decision has never been questioned, that, under this provision of the Constitution, Congress has the authority to establish courts-martial.

It was further held that the decision of the court-martial in a matter where it has jurisdiction is final and can not be reviewed by the courts. (20 How., 83; *Johnson* v. *Sayre*, 158 U. S., 109.)

Congress, in establishing courts-martial, provided that the Secretary of the Navy is authorized to establish "regulations of the Navy," with the approval of the President. (12 Stat., 565; Revised Statutes, sec. 1547.)

Pursuant to this authority, "regulations for the administration of law and justice" were issued on the 15th of April, 1870.

It has been held that such regulations have the force of law. (*Gratiot* v. *United States*, 4 How., 80; *Ex parte* Reed, 100 U. S., 22.)

Thus the legislative power is not exercised in detail, but a court is established in pursuance of the power conferred upon Congress, and the Secretary of the Navy is clothed with the power of making regulations to control the court.

This is one of the many instances in which it is essential for the operations of a great Government that matters of detail be intrusted by the legislative department to executive officers for the purpose of giving effect to legislative acts.

By article 34, Revised Statutes, section 1624, the proceedings of summary courts-martial are to be conducted under such forms and rules as may be prescribed by the Secretary of the Navy, with the approval of the President.

Here Congress has constituted a court and it has delegated to an executive officer authority to establish rules for its procedure.

By section 1547, Revised Statutes, the regulations issued by the Secretary of the Navy, and as they might thereafter be altered by him, with the approval of the President, are recognized as the regulations of the Navy.

In pursuance of these regulations Sayre became "a person in the naval service of the United States." He was tried by a court-martial, and the Supreme Court refused to review its findings. (*Johnson* v. *Sayre*, 158 U. S., 117.)

By an act of June 23, 1874 (18 Stat. L., 237, 240), an appropriation was made to be expended under the direc-

tion of the Secretary of War for the repairs, preservation, and completion of certain public works and *inter alia* "for the improvement of the harbor of Savannah."

A like appropriation was made by the act of March 3, 1875 (18 Stat., 459), "for the improvement of the harbor of Savannah, Ga."

Neither of these acts directed the manner in which these appropriations should be expended. The mode of improving the harbor was left to the discretion of the Secretary of War.

The legislative department declared that the improvements should be made, and devolved the determination of what would or would not be an improvement upon the Secretary of War.

It was contended that, while Congress had the power to authorize the construction of a specific work, it could not invest the Secretary of War with such large discretion, and that for this reason the act was void. This court sustained the act in *South Carolina* v. *Georgia*, 93 U. S., 13.

In that case, acting under the commerce clause, it authorized an improvement. It empowered the Secretary of War to determine what would or would not be an improvement, and so the act could not be made effective without the action of the Secretary of War. If he determined the character of the improvement, that was final and the act operated upon it.

In the case at bar, Congress makes the obstruction to navigation a misdemeanor. It devolves upon the Secretary of War to determine when there is an obstruction and to give the party a hearing upon the investigation.

When this special tribunal has determined that there is an obstruction, then the act operates upon it as in the former case.

In *Miller* v. *Mayor of New York* (109 U. S., 385, 393, 395) it appeared that Congress authorized the building of a bridge over a river, but the particular bridge authorized was such as should thereafter be approved by the Secretary of War. After the Secretary of War fixed by his approval the character of the bridge which was not an obstruction to navigation, then the act operated upon it and authorized the building of the bridge. Until then the legislative license did not go into effect. Here was a complete act in the abstract, but its operation in the concrete was dependent upon the determination of facts by the special tribunal. It was contended that this was an unlawful delegation of the power vested in Congress. The court held to the contrary, saying:

> By submitting the matter to the Secretary, Congress did not abdicate any of its authority to determine what should or should not be deemed an obstruction to the navigation of the river. It simply declared that, upon a certain fact being established, the bridge should be deemed a lawful structure, and employed the Secretary of War as an agent to ascertain that fact. Having power to regulate commerce with foreign nations and among the several States, and navigation being a branch of that commerce, it has the control of all navigable waters between the States, or connecting with the ocean, so as to preserve and protect their free navigation. Its power, therefore, to determine what shall not be deemed, so far as that commerce is concerned, an obstruction, is necessarily paramount and conclusive. It may in

> direct terms declare absolutely, or on conditions, that a bridge of a particular height shall not be deemed such an obstruction; and, in the latter case, make its declaration take effect when those conditions are complied with. The act in question, in requiring the approval of the Secretary before the construction of the bridge was permitted, was not essentially different from a great mass of legislation directing certain measures to be taken upon the happening of particular contingencies or the ascertainment of particular information. The execution of a vast number of measures authorized by Congress, and carried out under the direction of heads of departments, would be defeated if such were not the case. The efficiency of an act as a declaration of legislative will must, of course, come from Congress, but the ascertainment of the contingency upon which the act shall take effect may be left to such agencies as it may designate. *South Carolina* v. *Georgia*, 93 U. S., 13.

Sections 5133 *et seq.*, Revised Statutes, provide for the organization of national banks. Upon complying with certain conditions, persons are authorized to form such an association. These conditions are prescribed by Congress. The Comptroller, by section 5168 and section 5169, is charged with the duty of determining whether or not the association has complied with the conditions precedent. His determination is final. But section 5169 goes further, and provides as follows:

> But the Comptroller may withhold from an association his certificate authorizing the commencement of business whenever he has reason to suppose that the shareholders have formed the same for any other than the legitimate objects contemplated by this title.

Thus he is invested with the power of determining in what instances the legislative act shall be operative, and his determination is final.

By section 2380, Revised Statutes—

> The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

According to the strict contention contended for, this would be a delegation by Congress of its legislative power.

The decision of the Board of General Appraisers, ascertaining and fixing the dutiable value of imported goods, when such Board has acted in pursuance of law and without fraud or other misconduct from which bad faith could be implied, is final. (*Hilton et al.* v. *Merritt*, 110 U. S., 97; *Earnshaw* v. *United States*, 146 U. S., 60; *Passavant* v. *United States*, 148 U. S., 214, 220.)

And this is so, notwithstanding the fact that such appraisers have been called "legislative referees" by this court. (*Rankin* v. *Hoyt*, 4 How., 327, 335.)

In *Lathrop* v. *Stedman* (13 Blatch., 134, 150) a law was sustained providing for a charter repeal to go into effect upon ascertainment of certain facts by a special tribunal.

In *Currier* v. *West Side Elevated Patent Ry. Co.* (6 Blatch., 487) it was held that authority conferred upon commissioners to approve an experimental elevated railroad, and making such approval essential to the continuance in existence of the railroad, was not a delegation of legislative power.

The creation of a railroad commission to fix reasonable tolls for freight and passenger transportation is not an unconstitutional delegation of legislative powers. (*Georgia* v. *Smith*, 70 Ga., 694.)

Neither is giving power to the governor to make pilotage regulations. (*Martin* v. *Witherspoon*, 135 Mass., 175.)

The statute providing for the civil service authorizes the Commissioners and the President to make rules for carrying the act into effect, and the President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof. (22 Stat., 403; sec. 1753, Rev. Stat.)

Under the *Act of February 8, 1887* (24 Stat., 388), power is conferred upon the President, when he shall have determined certain facts, to allot land in severalty to Indians on reservations.

The principle contended for here by the Government does not in any respect go beyond that established in *Field* v. *Clark* (143 U. S., 649), in which it was held that Congress might confer authority upon the President to suspend by proclamation the operation of the law, affecting the importation of certain articles, upon his determination that any country producing such articles imposed duties upon the agricultural or other products of the United States which in his opinion were reciprocally unequal or unreasonable.

The court said:

> Legislative power was exercised when Congress declared that the suspension should take effect upon

> a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect (p. 693).

It has been often held impracticable to apply a narrow construction to the maxim "*delegatus non potest delegare*" in affairs of government. Necessity has compelled the adoption of the doctrine which permits, within certain limitations, a departure from the strict principle that legislative and executive authority can not be delegated. In terms it is not so expressed, but the fact is that way. Certain things are held to be consistent with the rule that power can not be delegated, but in their last analysis they are in fact a delegation which is necessitated by the conditions which surround the practical administration of the complicated affairs of government. Whether the result brought about would be a modification of the maxim that power lodged in one department of government can not be delegated, or whether it be a refinement upon the facts as to whether or not there is a real delegation, a practical solution has been reached by a wise judiciary.

Familiar examples are the creation of municipal corporations by the legislative power for the government of local affairs, and their endowment with large legislative and executive functions; the enactment of general laws providing for local option, which go into effect in particular localities only when invoked under certain conditions by the voters of those localities; the provisions for

the organization of corporations, conferring upon them powers of eminent domain, which operate only when an association of individuals apply for charters under them, thus giving to these voluntary associations the power of saying when and where the great prerogative of eminent domain shall be directed against the property of citizens; the right to refer the adoption or rejection of terms and conditions of a charter, or the question whether a county or township shall be divided, or a new one formed, or the question whether a general school law shall be accepted in a particular locality, or whether municipal subscriptions to works of internal improvement shall be made, to the decision of the people to be affected by it; the conditions prescribed by general laws for the organization of municipal corporations, with power to tax and to grant exclusive franchises, which lie dormant until invoked and effectively directed upon particular localities by the voluntary action of a specific number of voters or property holders; the provisions of similar character to those last named which are made for the purpose of adding new territory to municipal corporations.

All of these propositions have at times been contested on the ground that they were a delegation of legislative authority. It is an accepted fiction that the President does through his subordinates numerous acts the authority to do which is committed to him, and which it is well known he can not, in many instances, possibly know anything about—the same in regard to the subordinates of the heads of Executive Departments. The power conferred by Congress upon Executive Departments to

make rules and regulations for the government of their Departments, many of which are far-reaching in their effects, is of the vastest importance, and originates rules affecting rights of property which, by a strict construction, could emanate from Congress alone.

In discussing the question whether or not the operation of a law may fairly be made to depend upon a future contingency, Chief Justice Redfield in *State* v. *Parker* (26 Vt., 357, 366), said:

> One may find any number of cases in the legislation of Congress where statutes have been made dependent upon the shifting character of the revenue laws, or the navigation laws, or commercial rules, edicts, or restrictions of other countries. In some, perhaps, these laws are made by representative bodies, or, it may be, by the *people of these States*, and in others by the lords of the treasury or the boards of trade, or by the proclamation of the sovereign, and in all these cases no question can be made of the perfect legality of our acts of Congress being made dependent upon such contingencies. It is, in fact, the only possible mode of meeting them, unless Congress is kept constantly in session. The same is true of acts of Congress by which power is vested in the President to levy troops or draw money from the public treasury upon the contingency of a declaration or an act of war committed by some foreign state, empire, kingdom, prince, or potentate.

It is respectfully submitted that the questions certified should be answered in the affirmative.

J. M. Dickinson,
*Assistant Attorney-General.*

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FILED
APR 6 1896
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# In the Supreme Court of the United States.

OCTOBER TERM, 1895.

THE UNITED STATES, PLAINTIFF,
*v.*
FRANK M. RIDER, JOHN F. BURGESS, AND Samuel N. Rutledge, commissioners of Muskingum County, Ohio. } No. 197.

**ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.**

## SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

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At the hearing the question arose whether or not section 697 of the Revised Statutes, under which the points of disagreement in this case were certified to the Supreme Court, is still operative, in view of the act of March 3, 1891 (26 Stat. L., 826), and leave was granted to file a brief upon this point.

Sections 650, 651, 652, and 697 of the Revised Statutes are as follows:

> SEC. 650. Whenever, in any civil suit or proceeding in a circuit court held by a circuit justice and a

circuit judge or a district judge, or by a circuit judge and a district judge, there occurs any difference of opinion between the judges as to any matter or thing to be decided, ruled, or ordered by the court, the opinion of the presiding justice or judge shall prevail, and be considered the opinion of the court for the time being.

SEC. 651. Whenever any question occurs on the trial or hearing of any criminal proceeding before a circuit court upon which the judges are divided in opinion, the point upon which they disagree shall, during the same term, upon the request of either party, or of their counsel, be stated under the direction of the judges, and certified, under the seal of the court, to the Supreme Court at their next session; but nothing herein contained shall prevent the cause from proceeding if, in the opinion of the court, further proceedings can be had without prejudice to the merits. Imprisonment shall not be allowed nor punishment inflicted in any case where the judges of such court are divided in opinion upon the question touching the said imprisonment or punishment.

SEC. 652. When a final judgment or decree is entered in any civil suit or proceeding before any circuit court held by a circuit justice and a circuit judge, or a district judge or by a circuit judge and a district judge, in the trial or hearing whereof any question has occurred upon which the opinions of the judges were opposed, the point upon which they so disagreed shall, during the same term, be stated under the direction of the judges, and certified, and such certificate shall be entered of record.

SEC. 697. When any question occurs on the hearing or trial of any criminal proceeding before a circuit court upon which the judges are divided in opinion, and the point upon which they disagree is

> certified to the Supreme Court according to law, such point shall be finally decided by the Supreme Court; and its decision and order in the premises shall be remitted to such circuit court, and be there entered of record, and shall have effect according to the nature of the said judgment and order.

Under section 650, in a civil case, the cause proceeded to judgment, and whether or not there could have been an appeal or writ of error to the Supreme Court the judges, when their opinions were opposed, could certify any question to the Supreme Court.

Under section 651, in criminal cases, which then could not come to the Supreme Court as a matter of right, when there was a difference of opinion the cause might proceed to final judgment in the discretion of the court, but no imprisonment or punishment could be inflicted.

Section 697 provides for a decision in criminal cases of the questions of difference which have been certified to the Supreme Court.

The only difference between civil cases and criminal cases which could not go to the Supreme Court as a matter of right was that in civil cases it was necessary to proceed to final judgment, and in criminal cases this depended upon the discretion of the court.

The act of March 3, 1891, is entitled "An act to establish circuit courts of appeals and to define and regulate in *certain cases* the jurisdiction of the courts of the United States, and for other purposes."

It deals entirely *with appeals and writs of error and certiorari.*

It changes the status of criminal cases in that it allows writs of error in all cases, either to the circuit court of appeals or the Supreme Court.

It does not, in terms, have any reference to section 697 of the Revised Statutes.

The repealing section is as follows:

> SEC. 14. That section six hundred and ninety-one of the Revised Statutes of the United States and section 3 of an act entitled "An act to facilitate the disposition of cases in the Supreme Court, and for other purposes," approved February sixteenth, eighteen hundred and seventy-five, be, and the same are hereby, repealed. And all acts and parts of acts relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error in the preceding sections five and six of this act are hereby repealed.

It will be observed that this repeals, in terms, section 691 of the Revised Statutes, and "all acts and parts of acts *relating to appeals or writs of error inconsistent with the provisions for review by appeals or writs of error* in the preceding sections five and six of this act."

There is no express repeal of any section authorizing, before an appeal or writ of error would lie, a certification of questions upon a division of opinion to this court.

If section 697 was repealed by this act, then it must be by implication. This implication must arise because of irreconcilable difference, and because the two can not stand together.

There is nothing inconsistent between section 697 and the act of 1891. The two can stand together and operate with perfect harmony. They operate in different

fields—in the one case, as in the one at bar, *before final judgment*, and in the other, by express provisions of the act, *only after final judgment*.

It may be said that section 697 was enacted because there was no appeal in criminal cases, and it was desirable to give an opportunity to have the opinion of the highest court upon questions which could not be brought up in any other way.

The fact that Congress did not, when it passed the act of 1891, repeal this section, demonstrates that it considered it desirable to retain the provision giving an opportunity, before final judgment, in criminal cases, to have the opinion of the Supreme Court.

A very sufficient reason seems to be found in the fact that cases may arise, as in this case, where the trial judges have serious doubt as to whether or not an offense has been committed.

If they have no way of receiving instructions from the Supreme Court, such doubt would be resolved in favor of the party indicted, and thus the case would go off without any opportunity for settling the law. This would often, as in this case, embarrass the administration of government. The judges certainly would not, in case of doubt, so instruct the jury as to have the defendant convicted, in order to thus force an appeal and trial of the question before the Supreme Court. They would not thus deal with personal liberty, but would give the defendant the same benefit of doubt in respect of the law that the jury would give in respect of the facts.

All that Congress has done by the act of 1891 in respect of these criminal cases is to allow a writ of error.

If a special act had been passed, simply allowing a writ of error to the Supreme Court of the United States in all criminal cases, could it be said that this, by implication, repealed the section in question?

While the fact that there was no right to review the cause after final judgment may have been a sufficient reason for Congress allowing this certification of difference of opinion, it does not follow that the subsequent provision for writs of error does away with this privilege. The presumption is just the other way, for, there being no inconsistency, it is very clear that Congress would, in legislating upon the question, have repealed this section if it had such an object in view.

In *Ex parte Crow Dog* (109 U. S., 556, 570), the court said:

> It must be remembered that the question before us is whether the express letter of section 2146 of the Revised Statutes, which excludes from the jurisdiction of the United States the case of a crime committed in the Indian country by one Indian against the person or property of another Indian, has been repealed. If not, it is in force and applies to the present case. The treaty of 1868 and the agreement and act of Congress of 1877, it is admitted, do not repeal it by any express words. What we have said is sufficient at least to show that they do not work a repeal by necessary implication. A meaning can be given to the legislation in question, which the words will bear, which is not unreasonable, which is not inconsistent with its scope and apparent purposes, whereby the whole may be made to stand. Implied repeals are not favored. The implication must be necessary. There must be a positive repug-

nancy between the provisions of the new laws and those of the old. (*Wood* v. *The United States*, 16 Pet., 342; *Davies* v. *Fairbairn*, 3 How., 636; *United States* v. *Tynen*, 11 Wall., 88; *State* v. *Stoll*, 17 Wall., 425.)

The language of the exception is special and express; the words relied on as a repeal are general and inconclusive. The rule is *generalia specialibus non derogant*. "The general principle to be applied," said Bovill, C. J., in *Thorpe* v. *Adams*, (L. R. 6 C., P. 135), "to the construction of acts of Parliament is that a general act is not to be construed to repeal a previous particular act, unless there is some express reference to the previous legislation on the subject, or unless there is a necessary inconsistency in the two acts standing together." "And the reason is," said Wood, V. C., in *Fitzgerald* v. *Champneys* (30 L. J. N. S. Eq., 782; 2 Johns. and Hem., 31–54), "that the legislature having had its attention directed to a special subject, and having observed all the circumstances of the case and provided for them, does not intend by a general enactment afterwards to derogate from its own act when it makes no special mention of its intention so to do."

In *Chew Heong* v. *United States* (112 U. S., 536, 549), the court said:

The utmost that could be said, in the case supposed, would be that there was an apparent conflict between the mere words of the statute and the treaty, and that, by implication, the latter, so far as the people and the courts of this country were concerned, was abrogated in respect of that class of Chinese laborers to whom was secured the right to go and come at pleasure. But, even in the case of statutes whose repeal or modification involves no question of

good faith with the Government or people of other countries, the rule is well settled that repeals by implication are not favored, and are never admitted where the former can stand with the new act. (*Ex parte Yerger*, 8 Wall., 85, 105.) In *Wood* v. *United States* (16 Pet., 342, 362) Mr. Justice Story, speaking for the court upon a question of the repeal of a statute by implication, said: "That it has not been expressly or by direct terms repealed is admitted, and the question resolves itself into the narrow inquiry whether it has been repealed by necessary implication. We say by necessary implication, for it is not sufficient to establish that subsequent laws cover some, or even all, of the cases provided for by it, for they may be merely affirmative, or cumulative, or auxiliary. But there must be a positive repugnancy between the provisions of the new laws and those of the old, and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy." In *State* v. *Stoll* (17 Wall., 425, 430) the language of the court was that "it must appear that the later provision is certainly and clearly in hostility to the former. If, by any reasonable construction, the two statutes can stand together they must so stand. If harmony is impossible, and only in that event, the former law is repealed in part, or wholly, as the case may be."

It is therefore respectfully submitted that this court has jurisdiction to answer the questions certified.

J. M. DICKINSON,
*Assistant Attorney-General.*

JAMES H. MCKENNEY,
CLERK.

# Supreme Court of the United States.

NO. 197.

THE LAW ASSOCIATION
OF
PHILADELPHIA.

THE UNITED STATES, PLAINTIFF,

AG.

FRANK M. RIDER,
FRANK BURGESS, AND
SAMUEL M. RUTLEDGE,
DEFENDANTS.

## DEFENDANTS' BRIEF.

S. M. WINN,
F. H. SOUTHARD,
*Defendants' Attorneys.*

SIGNAL CO., PRINTERS, ZANESVILLE, OHIO.

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J. M. DICKINSON,
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S M. WINN,
F. H. SOUTHARD,
*Defendants' Attorneys.*

[No. 197.]

## SUPREME COURT OF THE UNITED STATES.

THE UNITED STATES, PLAINTIFF,

vs.

FRANK M. RIDER, JOHN F. BURGESS, AND SAMUEL M. RUTLEDGE, DEFENDANTS.

### STATEMENT.

This cause comes into this Court on a certificate of division in opinion between the judges of the Circuit Court of the United States for the Southern District of Ohio.

The questions submitted for the decision of this Court arose upon a proceeding founded upon a criminal information drawn under favor of sections four and five of the River and Harbor Act approved September 19th, 1890, a copy of which information is found on pages 1 and 2 of the transcript of record filed herein.

Said sections four and five of the River and Harbor Act approved September 19th, 1890, are as follows, to-wit:

"Sec. 4. That section 9 of the River and Harbor Act of August 11, 1888, be amended and reenacted so as to read as follows: That whenever the Secretary of War shall have good reason to believe that any railroad or other bridge now constructed or which may hereafter be constructed over any of

the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening of the draw span of such bridge by rafts, steamboats or other water craft, it shall be the duty of said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken."

"Section 5. That section ten of the River and Harbor Act of August 11, 1888, be amended and reenacted so as to read as follows; That if the persons, corporations or associations owning or controlling any railroad or other bridge shall, after receiving notice to that effect as hereinbefore required, from the Secretary of War and within the time prescribed by him, wilfuliy fail or refuse to remove the same or to comply with the lawful order of the Secretary of War in the premises, such persons, corporation or association shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine not exceeding Five Thousand Dollars, and every month such persons, corporation or association shall remain in default in respect to the removal or alteration of such bridge, shall be deemed a new offense and subject the persons, corporation or associations so offending to the penalties above deseribed."

Said criminal information charges in brief that the defendants, on October 15th, 1891, were Commissioners of Muskingum County, Ohio, and, as such empowered by the law of said state to construct, alter and keep in repair all necessary bridges over streams and public canals on all state and county roads, and, as such Commissioners, were then the persons controlling the bridge across the Muskingum River between Taylorsville and Duncans Falls in said county and state; that the Secretary of War, having good reason to believe that said bridge was then and there an unreasonable obstruction to the navigation of said Muskingum River, one of the navigable streams over which the United States has jurisdiction, gave notice, in writing, to said defendant Commissioners, on December 19th, 1890, that said bridge was considered an obstruction to navigation by reason of the fact that it had no draw for the passage of boats desiring to navigate said river by way of the new lock just above the south end of the new bridge at Taylorsville, Ohio, and in order to give said Commissioners reasonable opportunity to be heard, named January 6th, 1891, as the day when they should be heard before Lieutenant-Colonel William E. Merrill, at U. S. Engineer's office in Zanesville, Ohio; that said day of hearing was extended at defendant's request to February 3rd, 1891, and afterwards to February 25th, 1891, and that, after said day of hearing, the Secretary of War gave notice, in writing, to defendants controlling said bridge that said bridge was and is an unreasonable obstruction to the free navigation of said river on account of not being provided with a draw span below the new U. S. lock No. 9 in said river and requiring the following change to be made, viz: The construction of a draw span in said bridge below said lock in accordance with the plan shown in a map attached to said notice, and served upon said defendants, and prescribing that said alteration shall be

the navigable water ways of the United States is an unreasonable obstruction to the free navigation of such waters on account of insufficient height, width of span, or otherwise, or where there is difficulty in passing the draw opening of the draw span of such bridge by rafts, steamboats or other water craft, it shall be the duty of said Secretary, first giving the parties reasonable opportunity to be heard, to give notice to the persons or corporations owning or controlling such bridge so to alter the same as to render navigation through or under it reasonably free, easy and unobstructed; and in giving such notice he shall specify the changes required to be made and shall prescribe in each case a reasonable time in which to make them. If at the end of such time the alteration has not been made, the Secretary of War shall forthwith notify the United States District Attorney for the district in which such bridge is situated to the end that the criminal proceedings mentioned in the succeeding section may be taken."

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made and completed within a reasonable time, viz: On or before September 30th, 1891, and that the service of said notice was made March 3rd, 1891, upon said defendants personally. That said defendant Commissioners, on the 15th day of October, 1891, unlawfully and wilfully failed and refused to comply with the said order of the Secretary of War and make the alterations set forth in said notice after receiving notice to that effect, as required, from the Secretary of War and within the time prescribed by him, contrary to the form of sections four and five of an act of Congress, approved September 19th, 1890.

Upon the trial on said criminal information before the Hon. George R. Sage, District Judge sitting in the Circuit Court, a pro forma verdict of guilty was taken against the defendants by consent with the understanding that certain questions were reserved for hearing and decision upon a motion for a new trial to be heard before the Circuit Judge and the District Judge involving the constitutionality of said sections four and five of the River and Harbor Act.

The reserved questions which came on for hearing before the Hon. George R. Sage and the Hon. William H. Taft, Judges of said Court, were as follows, to-wit: (Page 4 of the Transcript of Record.)

First, whether Congress has the power to confer upon the Secretary of War the authority attempted to be conferred by said sections four and five of the act of September 19th, 1890, to determine when the bridge is an unreasonable obstruction to the free navigation of a river.

Second, whether the failure to comply, by persons owning and controlling the said bridge, with the order of the Secretary of War, can lawfully subject them to a prosecution for a misdemeanor.

Upon these questions said Judges were divided in opinion and ordered that said points of disagreement be certified to this Court.

## BRIEF.

With a view to a better understanding of the questions involved, as well as the conditions under which the criminal proceedings were begun and prosecuted below, we state in brief as follows:

The Muskingum river is situated wholly within the state of Ohio. The river is not navigable in its natural state except at times of high water, but was made so by the State of Ohio by means of a system of dams, locks and side cut canals. At the point on said river where the offending bridge is situated the Muskingum river descends into rapids through which no water crafts could pass except at times of high water. At the head of these rapids, under legislative grant from the State of Ohio, a dam was consnructed prior to 1836 across the main channel of said river entirely obstructing navigation thereon, and, by like authority, locks were built and a side cut canal was constructed southward from said dam joining said river below said rapids. About 1836 one James Taylor conveyed said dam and about 10 acres of ground, including said side cut canal and locks as now located to the State of Ohio. About the year 1838 the State constructed a new dam across the channel of said river above the location of said bridge and near the head of said rapids and completed the said canal and locks. Since 1838 said dam and side cut canal have been under the control of the State of Ohio through its Board of Public Works and through and by means of which canal, together with

other dams and canals, slack water navigation was maintained on said river up until the cession of said river and its improvements by the State of Ohio to the Federal Government, March 21st, 1887. About the year 1874 the Board of Commissioners of Muskingum County, under and by virtue of a grant from the State of Ohio by legislative act passed March 25th, 1870, located and constructed, in accordance with said act, the bridge herein complained of across the river immediately below said dam, thereby connecting the town of Duncans Falls with the town of Taylorsville, which lie upon the opposite sides of said river. The navigation of said river has all the while been carried on at said point through said side cut canal exclusively, and said canal has been kept open and free from obstruction; public travel over said bridge being accommodated by a draw bridge over said canal constructed by the Commissioners of said Muskingum County by authority of the said Board of Public Works and in accordance with plans approved by said Board of Public Works, and said Commissioners thereafter provided a tender for said draw bridge to open said bridge to admit the passage of all boats navigating said river, all of which occurred prior to the cession of said river and its improvements to the national government and continued down to the institution of said criminal proceedings. Since the cession of said river and its improvements by the State of Ohio to the general government and during the year of 1890 and 1891 with a view to abandoning said side cut canal as a means of navigation on said river the government has caused to be constructed in said dam at the head of said rapids locks where none theretofore existed and has constructed from said locks down said river under said bridge and through said rapids an artificial canal out side of the main channel of said river and has raised the locks and dam on the river below thus raisihg the water on the

level above and seeking to provide a new means for the navigation. The Muskingum River with its improvements was ceded by the State of Ohio to the government of the United States on the 2nd day of May, 1885, and such cession was accepted by the government by act of Congress approved on the 5th day of August, 1886, and the State of Ohio, by an act passed on the 21st day of March, 1887, made an appropriation for the purpose of completing the transfer of the Muskingum River improvements and properties to the United States and afterwards and before said criminal proceedings were begun consummated the transfer of such river and its improvements from the State of Ohio by deed of conveyance to the United States.

We desire to consider the questions presented together. Our claim is that the Secretary of War is not an officer in whom judicial power can be vested by act of Congress, and yet, by section four of the River and Harbor Act, congress has delegated to and vested in the Secretary of War the power and authority of determining whether or not a bridge constructed over the navigable water ways of the United States is or is not an unreasonable obstruction to the free navigation of such water way. By this section Congress has also authorized and empowered the Secretary of War to determine the question of obstruction to navigation whether the same shall have been caused on account of insufficient height, width of span or otherwise in the bridges either already constructed or hereafter to be constructed over any of the navigable waters of the United States, or whether there is difficulty in passing the draw opening or draw span of any such bridge by any water craft, and has vested in the Secretary of War the power and authority to direct such alteration of the same as in his judgment will render navigation through or under it free, easy and unobstructed, and delegates to the Secretary of

War the power and authority of determining and specifying the changes which in his judgment are required to be made and the reasonable time within which to make the same.

Before any criminal proceeings could be instituted under authority of sections four and five it is necessary that the Secretary of War shall have judically determined and adjudged,

First, that the offending bridge is an unreasonable obstruction to the free navigation to the water way.

Second, to judically determine and adjudge the nature and character of the alterations necessary to render navigation reasonably free and unobstructed.

Third, to judically determine and adjudge the time reasonably necessary in which to remove such obstruction.

All of these questions are questions of fact or mixed questions of law and fact, none of which could be determined by a Court without a jury unless the defendants consented thereto. The Secretary of War is not an officer in whom, under the constitution, judicial power can be vested. For authority on this proposition we refer to the case of Grant vs. Raymond, 6th Peters, 242.

The case now before the Court is a much stronger one than the case just cited, as that was a case of a reissued patent, and the patent, whether original or reissued, was open to defense, while in the case before the Court the Secretary of War is authorized and empowered to find and decide finally and conclusively all the questions above stated. Upon the trial of the criminal information in the Court below, no questions were left open upon which evidence could be introduced or the defendants heard in their defense, except the questions as to whether or not the Secretary of War had made his findings, ordered the changes and given the notices provided in the act and whether the defenants had complied with the

orders so given. The powers attempted to be delegated to the Secretary of War by section four of said act belong exclusively to congress and cannot be delegated. It has been repeatedly held by this Court that the power to determine where and whether a bridge may be located and constructed over any of the navigable waters of the United States is a power vested in congress, and in that body, also, rests the power of prescribing the nature and character of such structure.

We cite the following authorities to show that this power is paramount in congress:

Gilman vs. Philadelphia, 3rd Wallace, 713.

Bridge Co. vs. U. S. 105 (U. S.) 470.

Penna. vs. Bridge Co., 18th Howard 420.

Miller vs. Mayor et al., 109 (U. S.) 385.

As to whether a legal structure over a navigable water-way is an obstruction to navigation or an obstruction sufficient to require a change or removal are questions upon which Congress must pass directly and as a legislative body, and this power can not be delegated by that body to any agency. Where Congress by legislative act authorizes the construction of a bridge over a navigable water-way prescribing the location and manner of construction and the bridge is thereafter constructed in accordance therewith, it then becomes a legal structure, and whatever obstruction is thereby caused to navigation is a burden legally imposed; and if a bridge is constructed over a river wholly within the limits of a state by grant under an act of the legislature of such state and the bridge is constructed by authority and in accordance with such act and this is done before Congress has intervened, the bridge thereby becomes as much a legal structure as the one which has been constructed under congressional authority. It has been repeatedly held that before Congress intervenes states may authorize the building of bridges over the rivers within

their borders to accommodate public travel and commerce since there must be a reasonable regard for the two modes of travel, and that navigation is required to submit to some obstruction and inconvenience to accommodate the travel and commerce on land. And if it turns out that a bridge that is a legal structure whether built under authority and direction of an act of Congress or by authority and direction of a state before Congress has intervened, Congress acting directly by legislative act must require such structure to be remodeled or removed before the persons in control and charge thereof can be fined or punished for maintaining such bridge, although an obstruction to navigation. Such a bridge could not be declared a nuisance, or be abated as a nuisance by judicial action because the structure has been placed over the navigable water-way by and in accordance with an act of Congress legalizing it, or over a river wholly within the limits of a state by and in accordance with an act of a state legislature legalizing it before Congress has intervened. In such case before the structure could be declared a nuisance or abated as such Congress must act directly upon the question by legislative act or declaration.

We think this proposition is sustained by the ruling of the Supreme Court in the Wheeling &c. Bridge case, 18th Howard, 421.

The question as to whether Congress could delegate its authority to the Secretary of War as it has undertaken to do in the act under consideration was considered in the case of the United States vs. Keokuk & H. Bridge Co. reported in the 45th Federal Reporter in 1891 at page 180. The question in that case arose under sections nine and ten of the act of 1888 which were amended by sections four and five of the present act under consideration. The present statute is open to the same objection that was held fatal to the validity of the former statute in the case cited.

The questions under consideration before this Court were fully discussed in a well considered opinion delivered by the Hon. Judge Shiras in the case just cited. The Hon. Judge R. Sage, U. S. District Judge in the trial of this case below referred to and concurred in the conclusions and opinion announced by Judge Shiras, in the case just cited, and we refer the Court specially to the reasoning and conclusions reached by the Hon. Judge Shiras in said cause.

Respectfully submitted,

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Attorneys for Defendants.